No. 84-1337

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In The

Supreme Court of the United States

October Term, 1984

In The Matter of

MANDALAY SHORES COOPERATIVE HOUSING ASSOCIATION, INC., A NonProfit Section 501(c)(3) IRC, Benevolent Housing Corporation of the State of Florida, and MARY RIEDEL and RALPH MEYER,

Petitioners

v.

SAMUEL R. PIERCE, JR., SECRETARY OF DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and ALFRED HOFFMAN, JR., on behalf of MANDALAY ASSOCIATES, a Corporation to be formed,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The lawsuit involving the failure of the federal defendant to follow its own Regulations and National Public Policy in disposing of a valuable multifamily housing project at a price below its market value was dismissed by the district court on federal defendant's motion, on grounds of res judicata based upon issues which were not and could not have been incorporated in the prior complaint because they had not occurred and should not have occurred —

1. Is the district court decision in conflict with the Ninth Circuit case of Russell v. Landrieu, in determining HUD's statutory responsibilities?

2. Is the denial of judicial review by the circuit court in violation of Petitioners due process rights to a day in court?

3. Is the decision of the circuit court in conflict with the decisions of this Court and other Circuits by injecting new issue on appeal which was not raised by either party and then denying a motion for Rehearing and a suggestion for Rehearing en banc?

4. Is the refusal by the circuit court to follow its own Rules a denial of due process and access to the courts guaranteed by the Constitution of the State of Florida?

5. Is the decision of the 11th Circuit in conflict with the decisions of D.C. Circuit and the Fifth Circuit in Howes Leather Co. v. Carmen, and Hayes International Corp. v. McLucas, respectively, and with Bonner v. City of Prichard Alabama (5th Cir)?

(1) CERTIFICATE OF INTERESTED PERSONS - PARTIES

The parties named in the caption as petitioners and respondents.

The persons who are interested in the outcome of this case are as follows:

1. Mandalay Shores Cooperative Housing Association, Inc. ("MSCHA"), a nonprofit membership corporation, and its members. 2. The United States Department of Housing and Urban Development ("HUD") the Secretary of HUD, Samuel R. Pierce, Jr., and David Deutsch, Attorney for the Federal Defendant. 3. Jawdet I. Rubaii, Esq., Charles A. Medearis, Esq., Carlon M. O'Malley, Jr., William P. O'Malley, Esq., Clearwater, Florida, and Victor A. Altman, Esq. and the law firm of Krooth and Altman, Washington, D.C., attorneys for the Cooperative. 4. F. Wallace Pope, Esq. and the law firm of Johnson, Blakely, Pope, Bokor & Ruppel, P.A. Clearwater, Florida, counsel for Appellee Alfred Hoffman, Jr. 5. The trust held by the Bank of Clearwater whose beneficiaries are not known.

The Trial Judge was Senior District Judge Ben Krentzman.

(2) STATEMENT OF COUNSEL

I express a belief, based upon a reasoned and studied professional judgment, that the panel decision dated October 11, 1984, is contrary to the following decision of the Supreme Court of the United States: *Lutcher & Moore Lumber Co. vs. Knight*, 217 U.S. 257, 30 S.C. 505, 54 L. ed. 757 and that the panel decision is contrary also to 11th Circuit Rule 25 (a) - (d) inclusive and therefore contrary as well not only to the precedents of this circuit set forth in: *N.L.R.B. vs. Amalgamated Clothing Workers of America, AFL-CIO, L 990*, 430 F. 2d 966 (5th Cir. 1970) and *Matter of Perimeter Park Inv. Assoc., Ltd.*, 616 F. 2d 150 (5th Cir. 1980), but also to the precedents of the Supreme Court set forth in *Bounds v. Smith* 430 U.S. 817, 97 S. Ct. 1491, 52 L Ed. 2d 72, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court.

Carlon M. O'Malley, Jr.
and
William P. O'Malley
Attorneys for Petitioner

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On Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Eleventh Circuit dated October 11, 1984 and November 21, 1984 respectively, denying without opinion the petitioner's appeal and Petition for Rehearing and Petitioner's suggestion for Rehearing En Banc, is reproduced in the Appendix at A-1.

The opinion of the United States District Court for the Middle District of Florida, Tampa Division is unreported and is reproduced in the Appendix at A-2.

SEPARATE APPENDIX

The opinion of the United States Court of Appeals for Eleventh Circuit dated February 18, 1982 is reported at 667 F.2d 1195(1982) and is reproduced in the Appendix at A-3.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered October 11, 1984 and timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed and such petition was denied on November 21, 1984 by an unreported order without opinion which is reproduced in the Appendix at A-1. No opinion was rendered in either Order. This Petition for Writ of Certiorari was filed within ninety (90) days following that date.

STATUTES AND REGULATIONS INVOLVED

This petition involves four statutes and one regulation and the application of local rules of the Circuit Court of Appeals for the Eleventh Circuit:

(1) Title 12 U.S.C. Section 1713*(l)* authorizes the Secretary of HUD to dispose of multifamily housing projects acquired as a result of a mortgage foreclosure where HUD has insured such a mortgage. This statute mandates that the Secretary of HUD must protect the interests of the United States and of the General Insurance Fund in making such dispositions. In the instant case the Secretary did not hold title to the subject property as a result of a mortgage foreclosure but acquired such title in settlement of a contested default in a HUD held purchase money mortgage given to a prior buyer.

The statutory requirement imposed on the Secretary in

making dispositions of multifamily housing projects acquired by the Department of HUD to protect the interest of the United States and of the General Insurance Fund requires that when such projects have been nationally advertised for sealed bid sale to the highest qualified bidder on express sales terms and conditions (such as occurred in the case at bar) that such sales terms and conditions must be strictly observed and performed in order to avoid any discrimination, favoritism, or unjust enrichment, because of the public trust involved.

(2) HUD's Property Disposition Committee authorized the sale of the subject multifamily housing project on definite and strict terms and conditions because of the controversial issues involved and because of the desireability of this Gulf-front, beach project for condominium conversion in Clearwater Beach, Florida. The advertised sales terms and conditions were disregarded by HUD after the bidding was closed and the sale was awarded to a disqualified bidder who failed to meet the sales terms and delayed the closing for six months because he lacked the funds to pay for the property. The terms of the sale to this buyer were entirely different than were advertised or bid on by the other bidders including the Petitioner. If such relaxed sales terms and conditions had been advertised the property would have sold for over double the amount actually received by HUD and this is proven by the mortgage of record in the amount of $13,800,000.00. HUD sold for $6,232,716. to a disqualified bidder who assigned his interest to others and he never closed the sale. The HUD Property Disposition Committee authorization of sale is reproduced in the Appendix at A-4

(3) Administrative Procedure Act ("APA") 5 USC Sec. 702-706, which sets the standards for administrative rulemaking and which provides for judicial review of administrative actions.

(4) 42 USC §3535(o)(3) which imposes specific requirements on HUD's administrative rule making, over and above and in addition to APA requirements.

(5) HUD's advertised sales terms and conditions as expressed in the HUD sales brochure and bid packet which bound all bidders and HUD to follow such terms and conditions of the advertised sale. HUD failed to follow its own sales terms and conditions in the challenged sale. A-12.

(6) HUD Regulations which establish the Previous Participation Review Committee (popularly called the 2530 Review Committee) were required by Congress to clean up the corrupt practices complained of in property dispositions by HUD and should not have been disregarded when the Committee issued a notice of disqualification of the purported high bidder in this case. A-5.

(7) HUD Regulations published at 24 CFR Part 290, which establish the procedures to be followed in disposition of HUD owned multifamily rental housing projects and under which the HUD Property Disposition Committee met and specifically authorized the disposition of the subject matter property and the terms and conditions of such disposition. A-6 The terms and conditions were advertised nationally but were changed after the bids were opened but only for the benefit of a disqualified albeit high bidder. Petitioners were not offered the same deal.

STATEMENT OF THE CASE

This case involves the rights of the Petitioners as a disappointed bidder to challenge the procedure utilized by the Secretary in disposing of the multifamily housing project which was held by HUD as FHA Project number 067-00016 pursuant to a settlement of a contested default in a HUD-held purchase money mortgage given by HUD to a prior buyer. The nationally advertised sales terms and conditions were amplified in HUD's sales brochure and bid packet and all bidders were required to demonstrate with their bids that they had the financial ability to close the sale within 60 days following any award by HUD to the qualified high bidder. In addition the sales terms were clearly stated in the specimen deed and included conditions of sale

which would if violated cause title to revert to HUD. Detailed plans and specifications covering the required renovation and rehabilitation of the project were provided to all prospective bidders and they were required to furnish a $2,800,000 performance bond at time of closing to assure HUD of their ability to make the required repairs and replacements and to remove toxic asbestos from the ceilings. Paramount condition of the sale was that the bidder had to pass the Previous Participation Review Committee requirements to be eligible as a buyer regardless of the amount bid. Another requirement was that the project must be maintained as a rental complex for at least twenty years after the sale. These sales terms and conditions were so stringent that the market value of the project was depressed substantially below its appraised value. A-14. However after the high bidder, Alfred Hoffman, Jr., was notified by the Previous Participation Review Committee that he was disqualified because of prior unsatisfactory HUD relations, A-5. HUD nevertheless proceeded to allow him over six months to solicit various investors to provide the necessary funds to acquire the property. The respondent, Hoffman, never did close the transaction because he assigned the contract made with HUD to others. The buyer, Bank of Clearwater never bid on the property and never passed the HUD Previous Participation Review Committee approval because the Previous Participation Review Committee was bypassed by the HUD official who handled the final closing. The sales terms and conditions were relaxed for the ultimate buyer and represented an entirely different deal than was advertised; A-13, so much so, that the purchase money mortgage of record stands at Thirteen Million Eight Hundred Thousand Dollars ($13,800,000.00) with a base interest percentage rate of only 12% while the conventional mortgage interest rate on commercial properties was quoted at about 17% per annum. This mortgage carries a floating rate of 2% over the New York Prime lending rate but allows any excess interest to be added to principal and deferred. This clearly indicates that the value of the property is greatly higher than the amount of the *nonrecourse* mortgage loan.

If the other bidders including the Petitioner herein had been af-

forded the same relaxed terms and conditions as were given to the buyer (Bank of Clearwater) A-13 the sales price to HUD would undoubtedly have been double the amount actually paid, a mere $6,232,716 less prorations and adjustments.

The Petitioner was not the highest "bidder," due to the stringent terms and conditions of the advertised sale, but may have been the *highest qualified* bidder pursuant to and in reliance upon the Secretary's written Directive to the HUD Area Manager of the State of Florida, Everett H. Rothschild, which was also mailed to the Petitioner, and dated October 23, 1979. The Petitioner offered HUD Seven Million Five Hundred Thousand Dollars ($7,500,000.00) with an earnest money deposit of 5% as required in the amount of $375,000 in the form of an irrevocable commercial bank letter of credit payable to the Secretary of HUD, on August 6, 1981 pursuant to the terms of the written Directive from the Secretary. This letter from HUD is reproduced in the Appendix at A-7.

HUD rejected this $7,500,000 offer despite the fact that HUD had the power and authority to reject any and all bids and to accept the offer more favorable to the United States and more representative of the value of the property. A-8 At the time HUD rejected the Petitioner's $7,500,000 bona fide offer HUD had not entered into any other contract for the sale of the property. In fact the sale contract made by HUD with Alfred Hoffman, Jr., was not executed by HUD until October 16, 1981. A copy of such contract is reproduced in the Appendix at A-9. Hoffman, Jr., was not a "qualified bidder" in any event. A copy of the Petitioner's $375,000 letter of credit in favor of the Secretary of HUD is reproduced in the Appendix at A-10 A copy of the petitioner's Offer of $7,500,000 is reproduced in the Appendix at A-11.

The Petitioner has always been ready, willing and able to acquire this project at the price offered of $7,500,000 on the same terms which were given to the Bank of Clearwater, a non bidder. The petitioner has standing to sue as a disappointed bidder.

I PETITIONER'S DUE PROCESS RIGHTS VIOLATED BY CIRCUIT COURT INJECTING A NEW ISSUE ON APPEAL WHICH WAS NOT IN THE RECORD AND WHICH CONFLICTS WITH SUPREME COURT DECISION

The Respondents, federal defendant and Alfred Hoffman, Jr., never challenged the Petitioner's ability to pay the price offered for the property being disposed of by HUD. There is no such issue raised in the record. To the contrary, the record shows that the Petitioner MSCHA was at all times material ready, willing and able to close the transaction at the appointed time.

During oral argument before the circuit court, however, Judge Vance injected an issue for the first time in this case, as to whether or not the Petitioner had the money to purchase the property. This new issue took the Petitioner's counsel by surprise and his impromptu reply was not responsive to the question. As a result the panel apparently concluded that the Petitioner lacked the financial ability to close and was not acting in good faith by causing a possible resale of the property by HUD if the relief requested were to be granted. This apparently prompted Judge Vance to remark that Counsel was getting "perilously close to sanctions" whereupon the Petitioner's counsel, visibly shaken, and unnerved, hastily sat down without providing Petitioner effectual representation or further argument. The Supreme Court has ruled on this specific issue (of injecting a new issue on appeal by the Court of Appeals) and has held such to be in violation of due process rights requiring a remand and reversal of the order below. The record of the proceedings in the Court below will disclose that the above described dialogue did in fact occur during Oral Argument. The Court has declined to provide a transcript of the proceedings but on request of the Supreme Court would probably comply. Unrelated third party attorney present also heard the statements made by the panel and has verified the contents of the notes taken at the hearing. The liklihood is strong that such issue (injected for the first time by the panel) significantly affected the Court's deci-

sion. *Lutcher & Moore Lumber Co., vs. Knight*, 217 U.S. 257, 30 S.Ct. 505, so clearly controls the error of injecting new issues on appeal, that extended analysis of the point is unnecessary.

If, "...in the Circuit Court of Appeals, ... the cause was disposed of by that Court 'on questions not raised by either party, and not considered when this cause was submitted,' "

then "...it inevitably results that the effect of the action of the Circuit Court of Appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivilent to condemning them without affording them an opportunity to be heard." 30 S. Ct. at 509.

"...(I)n a case like this we think the judgment of the Circuit Court of Appeals must be reversed, and the case be remanded to that Court, to the end that the duty to hear and decide it may be performed." 30 S.Ct. at 510.

Denial of access to the courts is inexorably tied to the extraneous issue of 'ability to pay' which the panel injected for the first time at Oral Argument. In such circumstances re-hearing was warranted and was requested, but has been summarily denied, without opinion.

IIA. REASONS FOR ALLOWING THE WRIT

INTRODUCTION

The Eleventh Circuit declined to render any opinion despite the fact that the local rules of the Court require an opinion to be rendered. Rule 36 of the Federal Rules of Appellate procedure contemplates that some appeals will be decided without an opinion. But in Federal Courts where local rules have been adopted to delineate specific instances wherein opinions are not required, it has been instructively recognized[1] that such courts

> "...must - the word is must - never apply the rule to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues. This means that while Rule 21 should make a real contribution toward the goal of avoiding delays which can often amount to a denial of justice, it must be sparingly used."

The Eleventh Circuit's local Rule 25 while similar in many respects to Rule 21 of the old Fifth Circuit seems a bit less restrictive than the old Fifth Circuit Rule 21 as quoted in footnote 2 of *N.L.R.B. v. Amalgamated Cloth.WKRS* (supra footnote 1) but despite the teaching of Judge Brown's analysis (above quoted) the Panel failed to render any opinion thus effectively depriving Petitioners of their due process rights to access to the courts. The panel was seeking to terminate this litigation and without causing the federal defendant the possibility of having to re-offer the housing project for sale with questionable result. The error of depriving the Petitioner of access to the courts for the imaginary convenience of the federal defendant cannot justify a violation of the petitioner's constitutional right to a day in court. Expedience is not a fair substitute for justice and justice delayed is justice denied.

The test of the Petitioner's ability to pay the price offered was prematurely conducted without opportunity to be prepared for the question. The question was not at issue and does not appear in the record. The Petitioner is and has always been ready,

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1. *N.L.R.B. v. Amalgamated Cloth.WKRS. of America, A.F.L.-CIO, L990*, 430 F.2d. 966 (5th Circ.1970)

willing and able to consummate the transaction and demonstrated that ability as was required at the time of its offer. There is nothing in the record to suggest otherwise. That issue was never before raised.

On reflection the Panel would have realized, if the issue had been briefed and was appropriate to be discussed at Oral Argument, that the subject property could readily be transferred to the Petitioner at no cost to HUD or to the other defendant. In fact HUD would be financially benefited by such transfer and the other defendant would suffer no loss of investment. That is clear from the record of the acquisition since the Bank of Clearwater has no financial exposure and no investment whatsoever. Neither do the trust beneficiaries since the purchase money mortgage exceeds the amount paid to HUD. Such mortgage also exceeds the total amount of purchase price and the rehabilitation costs. The mortgage is non-recourse and in the event of court ordered transfer or a voluntary assignment of title from the titleholder Bank of Clearwater, the Petitioner would take title subject to the mortgage lien of record without detriment to the holder of such lien. In such a case HUD would receive an additional amount of purchase price and be relieved of its obligation as contained in the deed of record to assume the liability of the mortgage in the case of reverter of title. The interest of the United States would be bettered.

Petitioner mentions these facts, without waiving its objections to the injection of this new issue by the Panel, and merely to show that if this issue had been properly raised in the court below, the Petitioner's ability to acquire title would not have been an issue, and the record would have reflected that the Petitioner has always been ready, willing and able, and that HUD would not have been exposed to the uncertainty of amount to be realized upon a resale of the property to the Petitioner. HUD would receive an additional amount of $1,276,284 from the Petitioner which is the difference between the amount received from the Bank of Clearwater and the amount offered to HUD by the Petitioner. HUD should have accepted the $7,500,000 offer from

the Petitioner, in any event, rather than the $6,232,716 paid by the Bank of Clearwater. It was not in the best interest of HUD, the General Insurance fund and the United States, whose interests the Secretary of HUD is bound to protect, 12 U.S.C. 1713*(l)* to dispose of this valuable project for an amount which did not approach the appraised value and was less than was offered in good faith by the Petitioner. This is especially true where HUD chose to sell to a disqualified bidder, whose bid was not supported, *as required*, by proof of his financial ability to close within the appointed period of time. The proof of his inability to meet the terms of the sale as advertised lies in the fact that he never had the funds to close at the time of his bid or at the time he entered into the contract to pay the purchase price. He never closed because he could not. He assigned his "option" to the Bank of Clearwater for an undisclosed consideration. These documents are of record and were recorded with the Deed so that HUD cannot disclaim knowledge of this irregularity and failure to follow HUD's own regulations, advertised terms and statutory requirements concerning such dispositions.

Depriving the Petitioner of "its day in court" amounts to no more than a cover up to avoid an unpleasant disclosure involving the antics of a federal agency regardless of the high cost to the United States in lost revenue from the sale of property in the National Domain. This violates the rights of the citizens and taxpayers of the United States and is a matter of great public interest, as well the rights of the Petitioners. Failure to allow the Petitioner its day in Court and the threat of sanctions against the Petitioner's counsel has a chilling effect on the constitutional rights of the Petitioners and violates Public Policy.

III PETITIONERS HAVE A RIGHT TO RELY ON PRIOR SUPREME COURT DECISIONS AND LONG ESTABLISHED ADJECTIVE LAW

Petitioners have a right to rely upon the decisions of the United States Supreme Court and long established adjective law[2] under the Doctrine of Stare Decisis[3]. Petitioners respectfully suggest that the Supreme Court should not tolerate disobedience to its Decisions and the rules of Appellate Procedure as laid down by the Supreme Court in cases to which such decisions apply. The Panel should not be permitted to inject new issues on appeal which are outside the record and which have never been raised by either party. This is particularly true where, as in this case, the Panel did exactly that which the Supreme Court has forbidden, *Lutcher and Moore Lumber Co., vs. Knight* (supra). To make matters worse the Panel avoided the issue by failing to render any opinion whatsoever, with the effect, that lacking any opinion the Petitioner would be impeded in its efforts to seek any further relief. That constitutes an egregious violation of the constitutional rights of the Petitioners to access to the courts and consequently violates the Petitioners due process rights guaranteed by the 14th Amendment of the United States Constitution and the Constitution of the State of Florida Article 1, § 21[4]. The Federal courts are bound by the laws of the States in which they are situated under the Supreme Court decision in *Erie Ry. Co. v. Tomkins*, 304 US 64 and the Rules of Decisions Act., 28 U.S.C. 1652, this also includes the organic laws of the States. The Petitioners have not had their "day in Court" and are entitled thereto.

The Court below was surprised to learn during Oral Argument that the Appellants (Petitioners herein) had not had their day in court. The Panel remarked that the Appellants should have their day in court but erroneously overlooked that in rendering their affirmance without any opinion. That error should have been corrected on the Petitioner's Motion for Rehearing and Suggestion for En Banc hearing. But it was not.

The Petitioners earnestly believe that if allowed to have their "day in court" the factual evidence which will be presented to the trial court will persuade the court to grant the relief requested. This can only be accomplished by a plenary hearing where testimony can be given and evidence adduced. The Petitioner's rights to be heard have been flagrantly violated and only this Honorable Court can correct this serious invasion of constitutional rights.

This Court should determine that the Petitioners are entitled to their day in court and that they are entitled to have a review of the Administrative decision involved in this irregular transaction by HUD, under the provisions of the Administrative Procedures Act, 5 USC §§ 551-553, 702-706. For these reasons the petitioners respectfully request this Court to Grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

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fn. 2. "That part of the law which provides a method for enforcing or maintaining rights, or obtaining redress for their invasion." *Anderson v. Wirkman,* 67 Mont. 176, 215 P. 224, 227.

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3. "To stand by decided cases, to uphold precedents, to maintain former adjudications" 1 Kent,Comm. 477, 24 A.L.R.1215, *Quaker Realty Co., v. Labasse,* 131 La. 996,60 So.661,665,Ann.Cas. 1914A,1073: *Moragne v. States Marine Lincs Inc.,* 398 US 375, 26 L.Ed.2d 339.

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4. Fla. Const. Art. 1. § 21 expressly provides: "Access to the Courts. The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

IV FEDERAL AGENCY IS BOUND BY ITS OWN REGULATIONS AND PROCEDURES

HUD failed to observe and follow its own procedures and the Directive of the Property Disposition Committee as established in accordance with HUD's own published Regulations under 24 CFR Part 290 under which the subject disposition was authorized. A Copy of same is reproduced in the Appendix, A-4. HUD also failed to follow its nationally advertised terms and conditions of the sealed bid sale. A copy of the sales brochure which specified the terms of sale and the specimen deed and contract is reproduced in the Appendix, A-12. The deed and attachments of record clearly show the complete departure from the stringent terms upon which the Petitioners were required to bid. The Bank of Clearwater obtained relaxed terms which granted the title holder authority to subdivide, resubdivide, rent, sell, or in fact to do whatever is desired with the property. No other bidder including the Petitioner was given the slightest idea that such relaxed terms and conditions would be granted after the bids were opened. A-13.

"Regulations validly prescribed by a government administrator are binding upon him as well as the citizen, even when the administrative action under review is discretionary in nature." *Service v. Dulles*, 354 US 363, 1 L Ed.2d 1403, 77 S Ct. 1152, *Vitarelli v. Seaton*, 359 US 535, 3 L. Ed 2d 1012, 79 S Ct 968; *Accardi v. Shaughnessy*, 347 US 260, 98 L Ed 681,74 S Ct 499; *Yellin v. United States*, 374 US 109, 10 L Ed 2d 778, 83 S Ct.1828; *Pacific Molasses Co. v. FTC*, 356 F2d 386; *Inland Steel Co. v. United States*, 306 US 153,83 L Ed 557, 59 S.Ct.415.

V COOPERATIVE HAS STANDING TO SUE

As a rejected bidder, Cooperative (Petitioner herein) has standing to sue where HUD materially changed the terms and conditions of sale in favor of one bidder, (who was in fact a disqualified bidder and should not have been considered in the first place.) Cooperative suffered injury in fact. *Howes Leather Co., v. Carmen,* 680 F2d 818,820 (D.C.Cir.1982). The "injury in fact" is defined as the economic loss suffered by the low bidder by virtue of its inability to obtain the contract. *Hayes International Corp. v. McLucas.* 509 F. 2d 247 255, (5th Cir. 1975). The Hayes case (p. 248) plainly stated that an "unsuccessful bidder" for a government contract had standing to sue to have the contract awarded to a competitor set aside as being in violation of the regulations of the Government Department. That decision is binding as a precedent for the Eleventh Circuit by virtue of *Bonner v. City of Prichard Alabama,* 661 F.2d 1206(11th Cir. 1981).

Further, in *Kinnett Dairies, Inc.* v. *Farrow,* 580 F.2d 1260 (5th Cir. 1978), the Circuit Court approved this principle, citing the *Hayes* case, *supra* (p. 1265), as adopting the approach taken by the D. C. Circuit in such cases.

The 1982 D. C. Circuit case of *Howes Leathers, supra,* ruled for the disappointed bidder whose complaint had been dismissed under Rule 12(b)(6) for failure to state a claim. *Howes Leather* held that where, as here, the disappointed bidder alleged violations by the Federal defendant of applicable statutes and abuse of discretion, such disappointed bidder should be given the opportunity to adduce facts to support its claim.

The Cooperative as a bidder is within the zone of interest protected by the National Housing Act (12 U.S.C. 1713 *(l)* and 1701z-11). That Act expressly authorizes suit against HUD in the broadest terms. 12 U.S.C. 1702. *F.H.A.* v. *Burr, supra.*

Finally, there is no legislative intent to withhold from Cooperative the standing to obtain judicial review of its Com-

plaint as a disappointed bidder that HUD's conduct was arbitrary and capricious. On the contrary, there is a strong presumption of reviewability. *Howes Leather Co.* v. *Carmen, supra*, at 821, citing *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971).

VI *Cooperative Should Be Granted Leave To Amend The Complaint So That The Cause of Action Can Be More Fully Pleaded On The Basis Of Present Knowledge*

Liberal amendment should be granted to enable Cooperative to assert all viable claims arising from the facts as presently known. HUD and Hoffman filed motions for summary judgment and/or to dismiss, under Rule 12, F.R.C.P.

The review of such motions should be "lenient", and Cooperative should have the opportunity to adduce facts in support of its claims. *Howes Leather Co.* v. *Carmen, supra*, at 821. The policy under the Federal Rules of Civil Procedure is that "leave [to amend] shall be freely given when justice so requires." F.R.C.P., Rule 15(e).

As illustrated by this discussion, justice would be served through leave to amend because Cooperative has already demonstrated a viable cause of action. Amendment would permit the filing of additional pleadings to support this claim of improper bid administration. Such evidence includes the fact that bidder Hoffman as a beneficiary of the Land Trust Administered by Bank of Clearwater, raised the rents, in direct contravention of the advertised bid terms. This increased the value of the Project to Hoffman, to the detriment of Cooperative and other bidders who bid on the assumption that rents would not be raised for four years. Given the stated improprieties, this Court should permit Cooperative to seek redress for arbitrary, unlawful action by HUD and set aside the sale. Consistent with *Foman* v. *Davis*, 371 U.S. 178, 182 (1962), amendment is properly granted in this case even though the complaint was dismissed. See

Mineral Industries, Inc. v. *Occupational Safety*, 639 F.2d 1289 (5th Cir. March 19, 1981) which stated that the Fifth Circuit has pursued a course of "strong liability" in allowing amendments (p. 1292).

The Court Below Should Not Have Decided The Res Judicata Issue Under The Present State Of The Pleadings And The Record

HUD filed no answer to the Complaint. Instead, HUD filed a motion under Rule 12(b)(1) and (6) to dismiss the suit and/or for summary judgment, on the grounds of (i) *res judicata* or (ii) failure to state a claim upon which relief can be granted. HUD did *not* file a motion for summary judgment under Rule 56 or affidavits. HUD did not file a Motion under Rule 8, setting up *res judicata* as an affirmative defense. Hoffman adopted HUD's pleadings. HUD filed only a Memorandum in support of its Motion.

The court below had before it no part of the record in the First Suit — not even the unpublished memorandum opinion of Judge Hodges. Nor did the court below even note that this Court affirmed that opinion without restating the issues decided by Judge Hodges. R. 134-6.** Hence, reference to Judge Hodges opinion was essential. The court below appears to have taken unwarranted judicial notice of First Suit and the other suits to which it referred. R. 352-4. The Cooperative objected to the Rule 12 motion, stating that *res judicata* is raised under Rule 8(c) as an affirmative defense and should be set forth in the answer. R. 152-3.

The district court ruled on HUD's motion stating "...that this case should be DISMISSED." R. 351. It thus granted HUD's Motion for Dismissal and did *not* grant HUD's Motion for Summary Judgment.*

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* The court could not have granted summary judgment because HUD admitted there were disputed factual statements in the Complaint. R. 105.

** Any record references in this person are references to the record that will be furnished if certiorari is granted.

A. *Burden of Proof*

Res judicata is an affirmative defense which should be pleaded under Rule 8 and proved by the party claiming same. Since the issue will require facts which are outside the Complaint, the pleading should be supplemented with applicable affidavits. Under Rule 8, the burden of proving the affirmative defense of *res judicata* rests upon the party asserting it.

Thus, in *Hernandez* v. *City of Los Angeles*, 624 F.2d 935 (9th Cir. 1980), the Ninth Circuit stated (p. 937):

> "The burden of pleading and proving the identity of issues rests on the party asserting the estoppel. [Cit. omitted] To sustain this burden, a party must introduce a record sufficient to reveal the controlling facts and pinpoint the issues litigated in the prior action."

The Fifth Circuit follows the same "general rule" expressed by the Ninth Circuit in the *Hernandez* case, namely that "one who asserts the existence of an affirmative defense has the burden of proving that defense. . . ." *United States, etc.* v. *Wiring, Inc.*, 646 F.2d 1037, 1042 (5th Cir. June 1, 1981), reh. denied August 12, 1981.

HUD has not carried its burden or proof. It submitted no evidence in support of its motion which was only a few lines long. HUD's unsworn Memorandum is not evidence. *Concordia* v. *Bendekovic*, 693 F.2d 1073, 1075-6 (11th Cir. 1982).

B. *Motion To Dismiss Under Rule 12*

The court below had before it only the motion to dismiss and/or for summary judgment under Rule 12. There was no motion for summary judgment under Rule 56, F.R.C.P. The court below failed to require HUD to file affidavits or to treat the motion as one for summary judgment. Its decision treated HUD's motion as a motion for dismissal and granted dismissal of the suit. In so doing, the court below proceeded to decide the affirmative defense of *res judicata*.

This procedure is in error and grounds for reversal. *Moch* v. *East Baton Rouge Parish School Bd.*, 548 F.2d 594 (5th Cir. 1977), cert. denied 434 U.S. 859 (1977). The Fifth Circuit pointed out (p. 596) that a party cannot base a 12(b)(6) motion on *res judicata*, which must be pleaded as an affirmative defense. [The one exception noted in *Moch* is inapplicable here since the trial court did not treat HUD's Motion as one for summary judgment.] The decision is controlling in the Eleventh Circuit. *Bonner* v. *City of Prichard, Alabama, supra.*

C. *The Record Of The First Suit Is Essential.*

Since the Moch case, both the Fifth Circuit and this Circuit, as well as other circuits, have greatly increased the strictness of proof required to succeed with the affirmative defense of *res judicata*. In *Pennisi* v. *Alexander*, 611 F.2d 566 (5th Cir. 1980), the Secretary of the Army moved under Rule 12(b)(6) to dismiss on grounds of *res judicata*. The decision of the district court was reversed because the record on appeal did not contain the Complaint in the first action. The dismissal order in the first action was deemed insufficient. The case was remanded with instructions that "...the parties should be given the opportunity to litigate the merits of the affirmative defense of *res judicata*." P. 567.

In the instant suit, no pleading from First Suit is in the record on appeal.

This Circuit has applied very strict rules in pleading and proving *res judicata*. *Concordia* v. *Bendekovic, supra.* Thus, before an action may be summarily dismissed on the ground of *res judicata*, the ends of justice require as a minimum that the defense of *res judicata* appear from the face of the complaint or that the record of the prior case be received in evidence. (P. 1075) To satisfy the minimum requirement that the defense of *res judicata* appear from the face of the complaint (P. 1077) requires that "certified or exemplified copies of the pleading record or judgmental material" be presented to the Court. (P. 1076)

In the instant decision, the district court had before it no such documents from the First Suit. Accordingly, its decision violates *Pennisi* v. *Alexander, supra,* and *Concordia* v. *Bendekovic, supra.*

CONCLUSION

This Petition demonstrates that The United States Court of Appeals for the Eleventh Circuit has rendered a decision in conflict with decisions of this Court and other Courts of Appeal. The issue in this case present important problems of federal law and matters of great public interest and National importance in HUD's disposition program of its many HUD-held projects in the several states. The need for a National Policy on such sales or dispositions is great. The Eleventh Circuit decision in affirming without an opinion the arbitrary and capricious actions of HUD has created a conflict among the Circuits. For these reasons, Petitioner respectfully requests this Court to grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted this 19th day of February, 1985.

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

A copy of the foregoing Petitioner's Brief and Record Excerpts was duly served, by U.S. First Class Mail, postage prepaid, this 19th day of February, 1985, to the following:

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-3559

MANDALAY SHORES COOPERATIVE HOUSING ASSOCIATION, INC., etc., and MARY RIEDEL and RALPH MEYER,

Plaintiffs-Appellants,

versus

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL R. PIERCE, JR., Secretary of HUD, and ALFRED HOFFMAN, JR., on behalf of MANDALAY ASSOCIATES, A Corporation to be formed,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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(October 11, 1984)

Before FAY and VANCE, Circuit Judges, and MacMAHON*, District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

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* Honorable Lloyd F. MacMahon, U.S. District Judge for the Southern District of New York, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-3559

U.S. Court of Appeals
Eleventh Circuit
FILED November 21, 1984
SPENCER D. MERCER, Clerk

MANDALAY SHORES COOPERATIVE HOUSING ASSOCIATION, INC., etc., and MARY RIEDEL and RALPH MEYER,

Plaintiffs-Appellants,

versus

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL R. PIERCE, JR., Secretary of HUD, and ALFRED HOFFMAN, JR., on behalf of MANDALAY ASSOCIATES, A Corporation to be formed,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 11, 1984, 11 Cir., 1984, _____F.2d_____).
(November 21, 1984)

Before FAY and VANCE, Circuit Judges, and MacMAHON*, District Judge.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Fay
United States Circuit Judge

* Honorable Lloyd F. MacMahon, U.S. District Judge for the Southern District of New York, sitting by designation.

4-A

2-A

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

FILED July 20, 10:19 AM

Case No. 81-1187 Civ-T-BK

MANDALAY SHORES COOPERATIVE HOUSING ASSOCIATION, INC., (a Florida not-for-profit corporation) and MARY RIEDEL, and RALPH MEYER,

Plaintiffs,

vs.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL R. PIERCE, JR., Secretary of HUD and his successor or successors in title of FHA Project Number 067-00016, otherwise known as Mandalay Shores Apartments, and ALFRED HOFFMAN, JR., on behalf of Mandalay Associates, a corporation to be formed,

Defendants.

ORDER

The Court has for consideration defendants' motion to dismiss or for summary judgment.[1] Defendants raised two arguments in support of their motion. First, they contend that all or part of this case is precluded by the principles of res judicata. Second, even if the case is not precluded by previous litigation between some of these parties, defendants argue that plaintiff has failed to state a claim in this suit upon which relief can be granted.

1/ The motion was initially filed by defendants United States Department of Housing and Urban Development, and Samuel R. Pierce, Jr. (the federal defendants). Defendant Hoffman adopted the motion of the federal defendants. Hoffman also asserted that he is in privity with the federal defendants as subsequent purchaser of the property in question.

This is one of a series of actions filed within the last three years concerning the sale of the Mandalay Shores Apartments. The facts have been recited by this and other courts. *See Mandalay Shores Cooperative Housing Association v. Pierce, et al,* 80-356 Civ-T-H (M.D.Fla., order dated April 12, 1981), *aff'd* 667 F.2d 1195, *cert. denied* 103 S.Ct. 446 (1983); *Mann v. United States Department of Housing and Urban Development, et al.,* No. 81-288 Civ-T-K (M.D.Fla. order dated September 2, 1982) *aff'd* No. 81-5901 (11th Cir. March 28, 1983). The facts can be summarized as follows.

The Mandalay Shores Apartment complex was acquired by the Department of Housing and Urban Development (HUD) after default by previous mortgagors. The Department was interested in selling the complex. A group of residents were interested in buying the apartments and formed the Mandalay Shores Cooperative Housing Association (MSCHA) as a nonprofit corporation to facilitate the purchase. HUD and the resident's association attempted to negotiate a sale and purchase, but the Department's Property Disposition Committee felt that a sale by public bid was the best manner of disposition. HUD eventually accepted a bid by Mandalay Associates, a corporation formed by defendant Hoffman. Plaintiffs allege that even though they were the highest bidders, HUD accepted the lower offer of defendant Hoffman's group.

When it appeared that HUD would not accept its bid, MSCHA embarked on an extensive course of litigation. The opening salvo in federal court was in *Mandalay Shores Cooperative, et al. v. Pierce, et al.,* No. 80-356 Civ-T-H (M.D.Fla.). There, plaintiffs challenged the methods by which the Secretary of HUD refused to accept MSCHA's original offer and decided to put the complex up for public bids. The district court ruled that the relevant statutes used in that case gave the Secretary discretion in deciding the method for disposing of the complex. *Id., order dated April 12, 1981.* Plaintiff's have not prevailed on appeals from that ruling. *Id.,* 667 F.2d 1195 (11th Cir. 1983) *cert. denied* 103 S.Ct. 446.

In the second suit in federal district court, plaintiffs relied on several theories to block the impending sale to defendant Hoffman's corporation. *Daniel E. Mann, et al., v. United States Department of Housing and Urban Development, et al,* No. 81-288 Civ-T-K (M.D.Fla.). MSCHA sought damages and in-

junctive relief against HUD and several other defendants based on the presence of asbestos in the apartment ceilings. This Court held that subject matter jurisdiction was not present for any of the many federal statutory or constitutional provisions relied upon by MSCHA in that suit. *Id., order dated September 2, 1982.*

Plaintiffs also sought to block the sale of the apartment complex in United States Bankruptcy Court. *MSCHA, et al v. Pierce, et al.*, No. 81-547 (Bankruptcy Court, M.D. Fla.). Because identical issues were before two separate federal district courts, the Bankruptcy Court dismissed the cases on abstention principles.

Plaintiffs then filed this suit. In an eight count complaint, plaintiffs once again ask a court to intercede in their struggle to buy Mandalay Shores from HUD. This time, plaintiffs recognize that the complex has already been sold, and ask the Court to rescind the contract between HUD and defendant Hoffman's group. Plaintiffs add a new claim in this suit, alleging discrimination against aged and handicapped residents by HUD's refusal to sell the complex to MSCHA. *Complaint*, Count V.

Despite any new permutations in this suit, the principles grouped under the label of "res judicata" clearly mandate that this case should be dismissed. As the term is used today, res judicata refers generally to the preclusive effects of judgments in civil actions. One of the sub-principles of res judicata is now called "claim preclusion" or "true res judicata." Once a judgment is rendered, that judgment is the full relief to be accorded between the same parties on the same "claim" or "cause of action." *Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc.*, 575 F.2d 530, 535 (5th Cir. 1978); *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).

It is clear that the present suit involves the same "claim" or "cause of action" which was before this Court and another federal district court. There is no hard and fast definition for a "claim" which will be precluded by a previous adjudication. *See Restatement 2d, Judgments § 24 (1981).* The liberal rules for pleadings, joinder and amendments found in the Federal Rules of Civil Procedure envision that a litigant will bring all his or her claims in one suit. Because of this liberality, the rules developed concerning claim preclusion have rigorously restricted the opportunity for relitigation. *Id., pp 5-13.* Regardless of the defini-

tion given to a "claim" which is precluded by prior litigation, it is clear that changing the theory or ground for relief is not the presentation of a new "claim." *Id.*, § 25(d); *Carr v. United States*, 507 F.2d 191, 193 (5th Cir. 1975) *cert. denied* 422 U.S. 1043, 95 S.Ct. 2657, 45 L.Ed.2d 694 (1976). Here, plaintiffs have merely tinkered with the theories underlying their ultimate claim, the attempt to force HUD to sell the complex to the resident's association. While the theories are slightly changed, this is the same claim which should be precluded by the previous judgments.

It is also clear that the presence of some new parties on either side of this case does not block the preclusive effects of the prior judgments. Mary Riedel and Ralph Meyer are new plaintiffs in this action who were not named as parties in previous suits involving Mandalay Shores. They are long-time residents of the complex. Alfred Hoffman, Jr. bought the complex from HUD and is named as a new defendant. Generally, nonparties are not precluded by prior litigation involving the same claim. The major exception to this rule extends the preclusive effects to nonparties who were represented by the parties to the earlier suits. When an association represents the interests of its members, the preclusive effects of previous judgments apply to each member of the association. *18 Wright, Miller & Cooper, Federal Practice & Procedure*, § 4456 (1980). Here, plaintiffs have shown no dissimilarity between the interests of Riedel and Meyer and MSCHA. Likewise, it is clear that defendant Hoffman is in privity with previous defendants by virtue of his ownership of the complex.

In conclusion, the Court is of the opinion that the claim or cause of action involved in this suit was adjudicated at least one time previously by this or another federal district court. Plaintiffs should have brought all their claims in the first action, as required by the Federal Rules of Civil Procedure. Because they failed to do so, the doctrine of claim preclusion covered by the field of res judicata dictates that this case should be DISMISSED. Accordingly, defendants' motion should be, and is hereby GRANTED.

IT IS SO ORDERED at Tampa, Florida this 20 day of July, 1983.

BEN KRENTZMAN
SENIOR UNITED STATES
DISTRICT JUDGE